IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC93555
	)	
KARTEZ HARDIN	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 20
THE HONORABLE ANGELA TURNER QUIGLESS, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

In the Circuit Court of the City of St. Louis, Cause No. 1122-CR04439, the State charged by indictment that Kartez Hardin committed fourteen criminal counts. After a trial by jury, he was found guilty of the charged crimes. On March 22, 2012, the court sentenced Hardin to a term of years totaling 75 years. This timely-filed appeal followed. The convictions were affirmed in part and vacated in part in an opinion by the Missouri Court of Appeals, Eastern District, on May 21, 2013. On August 13, 2013, the case was ordered transferred by this Court after Appellant's application. Jurisdiction is in the Supreme Court of Missouri. Mo. Const. Art. V, Sec. 9; Rule 83.04.

STATEMENT OF FACTS

Kartez Hardin was charged with fourteen criminal counts relating to his wife, H.H., and her son, T.P.M. L.F. 31-44. The evidence at trial was that on July 19, 2010, H.H. had to take some papers to her former boyfriend's house. Tr. 205. Hardin followed her in his car. Tr. 205. She had spoken to her former boyfriend on the street for less than a minute when she saw Hardin. Tr. 205. She drove off. Tr. 205. Hardin blocked her path with his car at an adjoining street and motioned for her to pull over. Tr. 205, 211. When she did, he walked up and pulled open the driver's side door. Tr. 213. He took H.H.'s loaded gun out of the center console, grabbed her keys, and took these items to his vehicle. Tr. 213, 312. He then returned and started beating her. Tr. 213. He punched her repeatedly with a closed fist. Tr. 214. He got in the passenger side of the car and beat her more. Tr. 214-215. The beating ripped off some of her clothes. Tr. 216. He then ordered her to drive home, following her in his vehicle. Tr. 216.

As she drove home, she called her son's father and asked him to call the Dellwood police to meet her at the house. Tr. 217. When the police arrived, an officer asked H.H. if her husband had hit her. Tr. 218. She didn't respond, so the police left. Tr. 219. The next day, H.H. saw a doctor. Tr. 221. She had six facial

fractures and a ruptured eardrum. Tr. 222-225; 424; State's Exhibit 8. She missed work all week, and lost her job. Tr. 225-226

By the end of November of 2010, her relationship with Hardin was still turbulent. Tr. 228. On November 25, 2010, Hardin and H.H. argued because Hardin was drunk at a family event, disappeared for several hours, and as a result H.H. wasn't able to see a close friend who was in town. Tr. 229-230. The next day, she returned home to see Hardin's former girlfriend leaving their house. Tr. 232. H.H. responded by packing some clothes and leaving the house for the night. Tr. 234. The next day, November 26, 2010, she asked for a temporary restraining order because Hardin had called her the night before and told her he would kill her if she did not come home. Tr. 234. Also, she alleged he had beat her in front of her child two weeks before. Tr. 235-237.

On December 4, 2010, H.H. went to Hardin's aunt's house for help with a medical problem involving her son. Tr. 238-239. She was there for about fifteen minutes when Hardin walked in presenting chocolates, balloons, and roses. Tr. 240. When H.H. saw him, she shook her head. Tr. 240. Hardin then started beating the roses on the kitchen counter and yelling at her. Tr. 240. Hardin's relatives forced him to leave the house, but he waited outside. Tr. 214, 240. H.H. asked Hardin's aunt to walk her to her car. Tr. 241. After H.H. and her son got

in her SUV, Hardin started running towards the vehicle. Tr. 241. Hardin hoisted himself onto the luggage rack of her SUV. Tr. 241, 417. She tried to get him off the car by swerving back and forth to throw him off the vehicle. Tr. 242, 418. He kicked the windshield and the driver's side window. Tr. 242. When he kicked the driver's side window, the door somehow came open. Tr. 243. She stopped the car and he climbed in. Tr. 244.

Hardin forced H.H.'s son into the back seat, and later dropped him off near a relative's house. Tr. 245-246. H.H.'s son ran to his aunt's apartment, where he called the police. Tr. 421. H.H.'s son called his father and his father reassured him that everything would be okay. Tr. 422.

Meanwhile, Hardin had taken H.H. to the riverfront, where he threatened her into having sex with him. Tr. 250-254. H.H. lied to him afterwards, telling him that she wanted to be a family and they needed to find her son. Tr. 254. After some phone calls, H.H. determined that her son was now with his grandmother. Tr. 256. H.H. then told Hardin that the grandmother wouldn't turn her son over if Hardin was with her. Tr. 260. Hardin agreed, and she dropped Hardin off at his aunt's house. Tr. 261. After H.H. dropped off Hardin and picked up her son, she drove to the police station on Union Avenue and reported a violation of the *ex parte* order of protection. Tr. 263, 349.

Hardin was arrested, and began writing H.H. letters from jail. Tr. 297, 356. In those letters he begged her to drop the charges, told her he loved her, and said he was sorry he hurt her. Tr. 299. Letters were written on December 10, 11, 17, and 21, 2010. State's Exhibits 40-43; Tr. 298. He also called her phone number numerous times from the jail between December 5 and 21, 2010. Tr. 386. Also, at one point, he asked his sister to call H.H. and relay a message asking her to drop the charges against him. Tr. 300. At the time Hardin was arrested, he told the officer he had been served with the temporary order of protection that was entered on November 27, 2010. Tr. 358, 367.

Based on this evidence, a jury found Hardin guilty as a persistent felony offender of forcible rape (Count 1), kidnapping of H.H. (Count 2), kidnapping of her son (Count 3), endangering the welfare of a child for causing H.H. to lose control of her SUV (Count 4), violation of an order of protection on December 4 (Count 5), violations of an order of protection for writing and calling from jail (Counts 8, 9, 10, 11, and 12), property damage for kicking and damaging H.H.'s car (Count 6), aggravated stalking for writing and calling from jail (Count 7), domestic assault in the second degree for assaulting H.H. on July 19, 2010 (Count 13), and an attempt to commit victim tampering by attempting to persuade H.H. not to cooperate in the prosecution (Count 14). L.F. 31-44; 49-62.

On March 22, 2011, the judge sentenced Hardin to a term of 50 years of imprisonment for rape (Count 1), as well as 25 years (Count 2), 25 years (Count 3), 15 years (Count 4), one year (Counts 5, 7, 8, 9, 10, 11, 12), 15 years (Count 13) and 15 years (Count 14). S. Tr. 14-15. Count 1 was consecutive to the remaining counts for a total of 75 years. S. Tr. 15.

This timely-filed appeal was filed on March 29, 2012. L.F. 76.

POINTS RELIED ON

I - The trial court plainly erred and abused its discretion in sentencing Hardin to a term of 50 years of imprisonment for the crime of forcible rape (Count 1), because the sentence is outside the range of punishment for that offense, and is in violation of Hardin's right to due process of law and a fair trial and sentence as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the range of punishment is "life imprisonment or a term of years not less than five years" or a range of punishment of five years to life imprisonment.

State v. Stewart, 832 S.W.2d 911 (Mo. banc 1992)

State v. Williams, 828 S.W.2d 894 (Mo. App. E.D. 1992)

State v. Davis, 867 S.W.2d 539 (Mo. App. W.D. 1993)

State v. Juarez, 26 S.W.3d 346 (Mo. App. W.D. 2000)

Section 566.030

Section 558.019

U.S. Const. Amend V and XIV

Mo. Const. Art. I, Sec. 10, 18(a)

II- The trial court plainly erred in accepting the jury's verdicts and entering a judgment of conviction as to Counts 8, 9, 10, 11, and 12, because these convictions for violations of an order of protection violate double jeopardy and are plainly invalid, in violation of Hardin's rights to due process of law and double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Hardin was convicted of the crime of aggravated stalking (Count 7) for the same conduct alleged in Counts 8, 9, 10, 11, and 12, and the offense of a violation of a protective order is included in the offense of aggravated stalking because proof of the same conduct is required to sustain both convictions, and it is impossible to commit aggravated stalking without violating an order of protection.

State v. Smith, 370 S.W.3d 891 (Mo. App. E.D. 2012)

Blockburger v. United States, 284 U.S. 299 (1932)

State v. Derenzy, 89 S.W.3d 472 (Mo. banc 2002)

Section 556.041

Rule 30.20

U.S. Const. Amend V, XIV

Mo. Const. Art. I, Sec. 10

ARGUMENT

I - The trial court plainly erred and abused its discretion in sentencing Hardin to a term of 50 years of imprisonment for the crime of forcible rape (Count 1), because the sentence is outside the range of punishment for that offense, and is in violation of Hardin's right to due process of law and a fair trial and sentence as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the range of punishment is "life imprisonment or a term of years not less than five years" or a range of punishment of five years to life imprisonment.

Preservation. Counsel did not object to the sentence on Count 1; review is for plain error. Rule 30.20.

Standard of Review. An issue that was not preserved can be reviewed for plain error, which requires a finding that manifest injustice or a miscarriage of justice has resulted from the trial court error. *State v. Severe*, 307 S.W.3d 640, 642 (Mo. banc 2010) (*citing State v. McLaughlin*, 265 S.W.3d 257, 262 (Mo. banc 2008)). Rule 30.20 provides that the appellate courts will conduct plain error review of sentences that are alleged to be outside the statutory range of punishment. "Being sentenced to a punishment greater than the maximum sentence for an

offense constitutes plain error resulting in manifest injustice." *Severe*, 307 S.W.3d at 642.

Discussion. This case presents a simple issue that can be resolved through statutory interpretation. Hardin's sentence of 50 years for the crime of forcible rape is outside the range of punishment specified in Section 566.030.2.

The charged offense occurred on December 4, 2010. L.F. 11. Accordingly, Section 566.030.2, RSMo Supp. 2009 applies.[1] That section reads in relevant part:

> Forcible rape . . . is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years . . . .

Section 566.030.2.

Here, the State argued for a term of life imprisonment at sentencing, and stated that the range of punishment was "five years, up to a maximum of life in prison." S. Tr. 11. The sentence of 50 years that the trial court imposed for Count 1 is outside the range of punishment for the crime of forcible rape by the language of Section 566.030. "The maximum sentence authorized for forcible

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[1] This brief will refer to the 2009 version of the statute as "Section 566.030" for the remainder of this brief unless otherwise indicated.

rape or an attempt to commit forcible rape under § 566.030 is life imprisonment." *State v. Williams*, 828 S.W.2d 894, 903 (Mo. App. E.D. 1992) (construing Section 566.030, RSMo 1986, which contained an identical sentencing range of "life imprisonment or a term of years not less than five years."); *State v. Davis*, 867 S.W.2d 539, 542 (Mo. App. W.D. 1993) ("the unclassified felony of forcible rape is punishable by life imprisonment or a term of years not less than five years and not greater than thirty years."). "Under Section 558.019.4(1) . . . a sentence of life imprisonment is considered, for purposes of parole, as a sentence of 30 years imprisonment." *State v. Juarez*, 26 S.W.3d 346, 351 (Mo. App. W.D. 2000).

In addition to the language of the statute and these cases, this interpretation is supported by comparing the language at issue to criminal statutes that allow for an unlimited terms of years, such as Section 571.015.1. There, for the crime of armed criminal action, the range of punishment is simply "a term of not less than three years." This case, in contrast, has language allowing for a minimum sentence of five years, up to a life sentence. Section 566.030.2. These different statutory provisions cannot, as the State will argue, be read as providing for an identical range of punishment.

There are cases to the contrary that have summarily stated that an unlimited term of years is permissible for the crime of forcible rape. *Thomas v.*

Dormire is a habeas corpus case involving a *pro se* litigant, where the Court of Appeals, Western District found that a 99-year sentence was not a jurisdictional error cognizable under Rule 91. 923 S.W.2d 533, 534 (Mo. App. W.D. 1996). Additionally, a 2010 case deciding a different issue noted in *dicta* that certain changes to the statute in 1994 and 1995 (the insertion, then removal, of a provision providing for a 30-year maximum term of imprisonment for this crime) was a legislative attempt to increase the range of punishment for this crime to an unlimited term of years. *State v. Maples*, 306 S.W.3d 153, 157 (Mo. App. W.D. 2010). These cases do not support the State's position on appeal. In particular, *Maples* did not consider that the removal of the 30-year provision in 1995 that had been inserted the year before simply reverted the statute to how it read in 1993, when *Williams* and *Davis* had already been decided. The insertion and removal of this provision had no effect on the meaning of Section 566.030 as it reads today.

Appellant's point is further made by the fact that the assistant circuit attorney in this case read the statute as Appellant does, arguing at sentencing for the "maximum" sentence of life imprisonment. S. Tr . 11, 14. Further, the State has apparently argued for a reading consistent with Appellant's in at least one other case. In V*anzandt v. State*, 212 S.W.3d 228, 234-235 (Mo. App. S.D. 2007), a

post-conviction movant complained he was misinformed before a guilty plea that he faced a range of punishment of five years up to life imprisonment for an offense that contained identical language to that at issue here: an authorized term of "life imprisonment or a term of years not less than five." Section 566.062. The Court of Appeals found he had been advised correctly because "the maximum permissible punishment for [the crime] is life imprisonment." *Id.*

The ambiguity in the statute, demonstrated by its disparate readings from 1993 until the present day, must be resolved in favor of the defendant, not the State. "The rule of lenity gives a criminal defendant the benefit of a lesser penalty where there is an ambiguity in the statute allowing for more than one interpretation." *State v. Stewart,* 832 S.W.2d 911, 912 (Mo. banc 1992). "Language is ambiguous if it is reasonably open to different constructions." *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010). If the statute plainly and unambiguously provided for an unlimited term of years, there would not be so much contrary case law, as well as the State's words in this very case advocating Appellant's position. S. Tr. 11, 14. This Court will reject suggestions that it rewrite criminal sentencing statutes to achieve the State's desired range of punishment on appeal. *State v. Hart* , -- S.W.3d --, 2013 WL 3914430 *10 (Mo. banc 2013).

For these reasons, the sentence on Count I violates Section 566.030 and Hardin's rights to due process of law and a fair sentence in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, because the 50-year sentence imposed by the court was outside the maximum sentence authorized by law, which was life imprisonment, which is deemed to be a thirty-year sentence for purposes of parole eligibility. *Juarez*, 26 S.W.3d at 351. On Count I, Hardin must be resentenced. Section 566.030.

II- The trial court plainly erred in accepting the jury's verdicts and entering a judgment of conviction as to Counts 8, 9, 10, 11, and 12, because these convictions for violations of an order of protection violate double jeopardy and are plainly invalid, in violation of Hardin's rights to due process of law and double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Hardin was convicted of the crime of aggravated stalking (Count 7) for the same conduct alleged in Counts 8, 9, 10, 11, and 12, and the offense of a violation of a protective order is included in the offense of aggravated stalking because proof of the same conduct is required to sustain both convictions, and it is impossible to commit aggravated stalking without violating an order of protection.

Preservation. Counsel did not object to the convictions on Counts 8, 9, 12, 11, and 12 on these grounds; review is for plain error. Rule 30.20.

Standard of Review. "The right to be free from double jeopardy is a constitutional right that goes to the very power of the State to bring the defendant to in the court to answer the charge brought against him." *State v. Neher*, 213 S.W.3d 44, 48 (Mo. banc 2007). "As such, a claim of a double jeopardy violation that can be determined from the face of the record is entitled to plain error review." *State v. Smith*, 370 S.W.3d 891, 894 (Mo. App. E.D. 2012).

Discussion. Counts 8, 9, 10, 11, and 12 violate the double jeopardy clause of the Fifth Amendment and must be vacated. It guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb." U.S. Const. Amend. V. This clause provides two protections for criminal defendants: "(a) protection from successive prosecutions for the same offense after either an acquittal or a conviction and (b) protection from multiple punishments for the same offense." *Smith*, 370 S.W.3d 891, 894 (*citing State v. Stewart*, 343 S.W.3d 373, 377 (Mo. App. S.D. 2011)).

Missouri also has codified a statutory double jeopardy protection. In provides that "when the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if . . . [o]ne offense is included in the other." Section 556.041. An offense is included when "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." Section 556.046. "An offense is a lesser included offense if it is impossible to commit the greater without necessarily committing the lesser." *Smith*, 370 S.W.3d 891, 894 (*citing State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002)).

The "same elements" test of *Blockburger v. United States*, 284 U.S. 299, 304 (1932) is codified at Sections 556.041 and 556.046.1(1). *State v. Burns*, 877 S.W.2d 111, 112 (Mo. banc 1994). Courts will "simply determine the elements of the offenses at issue and compare them." *Id.* "If this comparison establishes that they do not each have an element that the other offense lacks, the guarantee against double jeopardy bars the prosecution of the second offense. If both offenses have elements that the other lacks, the guarantee does not bar the subsequent prosecution." *State v. Reando*, 313 S.3d 734, 738 (Mo. App. W.D. 2010). "[O]nly the statutory elements of the offenses are relevant, not the evidence adduced at trial." *Id.*

The Court of Appeals, applying the *Blockburger* test, has recently found that the offense of violating an order of protection (Counts 8, 9, 10, 11, 12) was contained within the offense of aggravated stalking (Count 8) and that convictions of both crimes for the same conduct violate double jeopardy. *Smith*, 370 S.W.3d at 895.

A person commits the crime of aggravated stalking "if he or she purposely, through his or her course of conduct, harasses or follows with the intent of harassing another person, and . . . at least one of the acts constituting the course

of conduct is in violation of an order of protection and the person has received actual notice of such order." Section 565.225.2.

The statutory elements of violating an order of protection are set out in Section 455.085.2. In relevant part, a person commits the crime of violating an order of protection where "a party, against whom a protective order has been entered and who has notice of such order entered, has committed an act of abuse in violation of such order." *Id*.

Thus the offense of violation of a protective order is included in the offense of aggravated stalking because proof of the same conduct is required to sustain both convictions. *Smith*, 370 S.W.3d at 895. It is impossible to commit aggravated stalking without violating the order of protection. *Id*.

Counts 8, 9, 10, 11 and 12, charging Hardin violated an order of protection, alleged he contacted by calling (Count 8), and writing (Counts 9, 10, 11, 12) between December 5 and 21 of 2010. L.F. 38-42. Count 7 alleged "aggravated stalking" by calling and writing H.H. between December 5 and 21, 2010 in violation of an order of protection. L.F. 37. Exactly like in *Smith*, the counts alleging a violation of a protective order are included in the offense of aggravated stalking because proof of the same conduct is required to sustain both convictions. 370 S.W.3d 891, 895. And it would be impossible to commit

the charged count of aggravated stalking without violating the order of protection in the manner charged. *Id*.

Based on the foregoing, the trial court committed plain error in accepting the jury's verdicts on Counts 8, 9, 10, 11 and 12 because these offenses of violation of an order of protection were contained within the offense of aggravated stalking (Count 7) and that convictions of both for the same conduct violates double jeopardy. *Smith*, 370 S.W.3d 891, 895. Counts 8 through 12 must be vacated.

CONCLUSION

Based on Point I, Count 1 must be remanded for resentencing.

Based on Point II, Counts 8, 9, 10, 11 and 12 must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that a true and correct copy of the foregoing brief was served via the efiling system on **September 11, 2013** to the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Book Antiqua 13 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains **4,448** words.

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